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# Supreme Court of the United States

OCTOBER TERM—1946

No. ~~1354~~ 1355 85-86

AMERICAN THEATRES ASSOCIATION, INC.; SOUTHERN CALIFORNIA THEATRE OWNERS ASSOCIATION; JOSEPH MORITZ; SOUTHERN CALIFORNIA AMUSEMENT COMPANY, INC.; EXHIBITORS' SERVICE, INC.; LAWRENCE CAPITOL, INC.; BIJOU AMUSEMENT COMPANY and PAUL REALTY COMPANY; ANDY ANDERSON; ARCH and MILAS L. HURLEY; RAYMOND and WILLARD GERVERS; GAMBLE ENTERPRISES, INC.; and ST. LOUIS AMBASSADOR THEATRE, INC.; EDEN THEATRE COMPANY, ST. LOUIS MISSOURI THEATRE, INC., and FANCHON & MARGO SERVICE CORPORATION, *Petitioners-Appellants,*

and  
W. C. ALLRED; CHARLES E. BEACH and ELIZABETH L. BEACH, partners trading as BEACH and BEACH; BISCAYNE BEACH THEATRE, INC.; T. N. CARNAHAN; CENTRAL AMUSEMENT COMPANY, INCORPORATED; EMMA COX; W. F. CROCKETT, DAVID PENDER, JR., THELMA H. CROCKETT and MRS. E. P. THOMPSON, partners trading as BAYNE-ROLAND THEATRES; H. A. EVERETT; WILLIAM R. GRIFFIN, SALLIE M. WISE and FRANK V. MERRITT, partners trading as CULLMAN AMUSEMENT COMPANY; NAT HANCOCK; J. O. HARRIS and E. L. HARRIS, trading as J. O. and E. L. HARRIS; J. B. HARVEY; LEXINGTON AMUSEMENT COMPANY, INC.; M. C. MOORE; W. W. MOWBRAY; NEIGHBORHOOD THEATRE, INC.; PALACE AMUSEMENTS, INC.; BENJAMIN T. PITTS; HENRY REEVE; RITZ, INC.; THEATRE; STRAND AMUSEMENT COMPANY, INCORPORATED; THE SOUTHERN AMUSEMENT COMPANY, INCORPORATED and SIDNEY WHARTON; *Petitioners-Appellants,*

E-87-273

vs.  
UNITED STATES OF AMERICA, *Plaintiff-Respondent,*

and  
PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBER-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, COLUMBIA PICTURES CORPORATION, SCREEN GEMS, INC., COLUMBIA PICTURES OF LOUISIANA, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG-U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION, *Defendants-Respondents.*

JOINT BRIEF OF AMERICAN THEATRES ASSOCIATION, INC., ET AL., AND W. C. ALLRED, ET AL., INTERVENORS, OPPOSING THE SEPARATE MOTIONS OF TWENTIETH CENTURY-FOX, LOEW'S, RKO, PARAMOUNT AND WARNER DEFENDANT-RESPONDENTS, FOR AN ORDER DISMISSING APPEALS OF AMERICAN THEATRES ASSOCIATION, INC., ET AL. AND W. C. ALLRED, ET AL.

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and

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## Statement of the Issues Involved

On December 31, 1946, the Court below entered its final decree in the above entitled proceedings. Paragraph 8 of Part II of that decree

authorized and directed the defendants herein, who distribute approximately 70% of the feature pictures sold to independent theatres, to institute a program of uniform action confining the market in feature pictures to a competitive bidding system. At the hearing prior to the entrance of said decree, American Theatres Association, Inc., *et al.* and W. C. Allred, *et al.*, hereinafter called *intervenors*, filed their separate motions for intervention in the Court below opposing competitive bidding as directed by the Court in its opinion.

Intervenors have appealed to this Court asking:

1. That the provision in this final decree requiring competitive bidding by uniform action of the defendants be reversed; and
2. That orders which the District Court entered after its decree had become final, denying intervenors leave to intervene, be reversed.

In connection with their appeals, intervenors filed in this Court two separate jurisdictional statements. The sufficiency of both of these statements is now attacked by defendants in joint motions to dismiss intervenors' appeals. The objections made to each of the jurisdictional statements are the same. For that reason intervenors file this joint brief in reply.

The allegations set out in both jurisdictional statements may be summarized as follows:

The decree of the Court has authorized and directed to the irreparable damage of intervenors the program of joint uniform concerted action to be taken by the major distributors of the pictures which intervenors must buy. That program in effect sets up, authorizes and approves a combination among the major distributors which would be unques-

tionably in restraint of trade if self-imposed without authorization by the Court. By the Court's approval of this judicial combination, the Court attempts to take away the legal rights of petitioners to enjoin the combination. Thus, the Court effectively denies intervenors in competitive areas access to a market in which they may purchase their feature films free from the plan of uniform control to be instituted by the defendants acting in reliance on the Court's decree.

The basis of intervention in the Court below is Rule 24 (a), subsection (2), Federal Rules of Civil Procedure. That rule provides for intervention of right "when the representation of the applicants' interest by existing parties is or may be inadequate, and the applicant is or may be bound by the judgment in the action." The jurisdictional statements filed by intervenors show that all of the requirements for intervention of right under the above quoted rules are satisfied, to wit:

**The Representation of Intervenors' Interests in  
Opposing the Combination Restricting Their  
Market for Films Is Inadequate**

The only party which could theoretically represent the interests of intervenors in establishing a free and unrestricted market for films was the Government. The Attorney General has voiced no objection to the enforced system of competitive bidding, as such. He presented no argument against the irreparable injury which such a system will impose on intervenors. Counsel for the Government indicated its willingness to try out a plan of competitive bidding in the event that it is unable to obtain the specific relief of divorcement. Intervenors are inadequately represented because the Attorney General has declined to permit or argue their objections to the plan.

**The Requirement for Intervention as of Right,  
i. e., That "The Applicant Is or May Be Bound  
by a Judgment in the Action", Is Satisfied by  
the Jurisdictional Statements**

It is apparent that the intervenors will be bound by the decree because:

1. They will be compelled to submit to the market regulations imposed by the uniform action required of distributors who control the greater portion of their supply of feature pictures.

2. Their present right to enjoy a combination controlling the market for feature film and compelling competitive bidding as the sole means of distribution, will be taken away; they will be unable to sue for damages on account of injury caused by the Court plan.

It can scarcely be argued that this will not be the effect of the decree, because any independent action taken by intervenors will be met by the defense that the defendants are acting in accordance with the directions of the District Court. It should be noted that the rule not only covers cases where the intervenors are bound as a matter of law, but also cases where they "may be bound".

**Two Decisions of This Court, Both Directly in Point,  
Sustain Intervenor's Jurisdictional Statements**

The principal cases on which intervenors rely in their jurisdictional statements are *Missouri Kansas Pipe Line Co. v. U. S.*, 312 U. S. 502, 506-509, and *U. S. v. Terminal R. R. Assoc. of St. Louis*, 236 U. S. 194, 199.

In the *Missouri Kansas Pipe Line* case, the Court allowed intervention on the ground that Rule 24 covered those

situations "where the enforcement of a public law . . . demands distinct safeguarding of private interests . . . the power to enforce rights thus sanctioned is not left to the public authorities, nor put in the keeping of the District Court's discretion". In that case intervention was permitted on the broad ground that the intervenors' "right to economic independence was at the heart of the controversy". This precise ground is spelled out in detail in both of the jurisdictional statements filed by intervenors. These statements show, and the brief in opposition does not controvert the fact that the entire business of petitioners is endangered if their access to the market is limited by a system imposed upon them which destroys all established relationships on which intervenors now depend for their pictures, and compels them to bid against each other and the major distributors for the benefit of the major distributors. All competition between sellers of pictures is eliminated. The jurisdictional statements further show that there are no reviewable criteria possible by which the successful bidder can be selected. The choice must, therefore, lie entirely within the uncontrolled business judgment of the defendants, who have already been held guilty of discrimination in violation of the Sherman Act.

The *St. Louis Terminal* case, above cited, is equally in point. The right of the intervenors in that case which this Court adjudicated on appeal was the same, in substance, as the right urged by intervenors here.

The only difference between the *St. Louis Terminal* case and the situation before the Court here is the technical one that in the *St. Louis Terminal* case, petitioners intervened directly in the Supreme Court of the United States. This difference is relied on by defendants. We consider it without substance. However, for the purpose of removing possible doubt, intervenors ~~have filed~~ an original motion to

*intend to file*

intervene in this Court similar to the one approved in the *St. Louis Terminal* case.

### **Analysis of Defendants' Objections to Intervenor's Jurisdictional Statements**

1. It is argued that the order denying intervention is not a final decree, and hence may not be appealed to the Supreme Court under 15 U. S. C., Section 29.

The obvious answer is that intervenors appealed from the final decree entered by the Court on December 31, 1946, and from the order denying intervention made after the entry of that final decree, which bound intervenors and took away rights against the combination which they would otherwise have had. These facts make all of the cases cited by defendants on this point irrelevant. The cases principally relied on are cases of permissive intervention sought by parties not bound by a final decree. For example, in *Allen v. Cash Register Co.*, 322 U. S. 137, the leading case cited by defendant, the intervenor in an anti-trust suit opposed the acquisition of the business of a competitor by the defendant. Such acquisition did not control or destroy intervenor's market. It did not affect him, except incidentally. The Court held there was no intervention of right under these circumstances. The Court further held that intervenor was adequately represented by the Government, which also opposed the acquisition. In its opinion this Court cited the *Missouri Kansas Pipe Line Co. v. U. S.* case, on which we relied, clearly implying that had the situation been as it was in that case, the action of the District Court on petitioner's intervention would have been subject to appeal. The situation of the intervenors here is the same as the intervenors in the *Missouri Kansas Pipe Line* case.

Defendants, in their motions to dismiss, attempt to distinguish the *Missouri Kansas Pipe Line* case on the ground that in that case the intervenors were designated by name in the Court's decree, while in the case before the Court their names are not given. There can be no substance to such a distinction. There was no doubt that the Court's decree binds all independent theatres in competitive areas because they are the only buyers of feature film in the market, aside from the defendants themselves. Furthermore, the opinion in the *Missouri Kansas Pipe Line* case is based, not on narrow technical considerations of names in the decree, but on the broad ground that persons whose rights are adversely affected by an anti-trust decree are entitled to protect them through intervention as of right.

*U. S. v. California Cooperative Canneries*, 279 U. S. 553, the second case cited, is not a case on appeal from an order denying intervention. It simply determines the lack of jurisdiction of the United States Court of Appeals of the District of Columbia under the Expediting Act. The dictum in the case on which defendants apparently rely refers to the old equity rule in force prior to the present Rule 24 of the Federal Rules of Procedure. Regardless of the accuracy of that dictum, there is no question today that Rule 24 has enlarged the former right to intervene. In a recent case, *Cameron v. President & Fellows of Harvard College*, 157 F. (2d) 993, C. C. A. 1st, Nov. 7, 1946, analyzing the appealability of an order denying an intervention of right, the Court of Appeals for the First Circuit said:

"Certainly decisions denying applications to intervene as of right under paragraph (a) of the Rule are final (see *Burrow v. Citizens' State Bank*, 5 Cir., 74 F. (2d) 929, 930), since they purport ultimately to decide questions of substantive legal right. . . . The statement is made in some of the older cases that an order denying an application for leave to intervene

addressed to the discretion of the District Court is 'not of that final character' which furnishes 'the basis for appeal.' *City of New York v. Consolidated Gas Co.*, 253 U. S. 219, 221, 40 S. Ct. 511, 512, 64 L. Ed. 870 and cases cited. See also *City of New York v. New York Tel. Co.*, 261 U. S. 312, 316, 43 S. Ct. 372, 67 L. Ed. 673; *Allen Calculators, Inc. v. National Cash Register Co.*, 322 U. S. 137, 142, 64 S. Ct. 905, 88 L. Ed. 1188. Perhaps this statement may be warranted for the reason that only rarely, if ever, could it be shown that a District Court abused its discretion in denying permissive intervention. . . . However, we venture to question its verbal accuracy. Decisions reached by an exercise of judicial discretion ordinarily are reviewable, if they are final, although, of course, on appeal the scope of review is limited to the question of abuse of discretion." (Emphasis supplied.)

The Court went on to say, however, that an order refusing intervention is not a final and appealable order unless the applicant for intervention has no other adequate means of asserting his rights, citing *Cresta Blanca Wine Co. v. Eastern Wine Corp.*, 143 F. (2d) 1012. That intervenors' position meets this test is amply demonstrated by the jurisdictional statements.

In the *Cameron* case the Court considered the intervenor's position with respect to each paragraph of Rule 24(a) separately and in the disjunctive and found that the intervenor was not entitled to relief under any one of them. Similarly, Sections 24.07 and 24.08, 2 Moore's Federal Practice, demonstrate clearly that the effect of Rule 24(a) is not to require an interest in a *res* as the sole ground for absolute intervention but rather is to designate it as one of three distinct grounds, any one of which gives intervention as of right. See also *Mullins v. DeSoto Securities Co.*, 2 F. R. D. 502 (W. D. La., 1942), app. dismissed 136 F. (2d)

55 (C. C. A. 5th, 1943); *Mack v. Passaic Nat. Bank & Trust Co., et al.*, 150 F. (2d) 474 (C. C. A. 3d, 1945) holding that one who has an absolute right to intervene under Rule 24(a) has an absolute right to appeal from an order denying intervention; *Wolpe v. Poretsky*, 144 F. (2d) 505 (App. D. C. 1944), cert. den. 323 U. S. 777, 65 S. Ct. 190 (1944), in which adjoining property owners in a suit to vacate a zoning order were held to have such a vital interest in the suit as to be entitled to intervention as of course even though they had applied for permissive intervention. Cf. *Blumgart v. St. Louis-San Francisco Ry. Co.*, 94 F. (2d) 712 (C. C. A. 8th, 1938), cert. den. 304 U. S. 567, 58 S. Ct. 1041 (1938); *Palmer v. Guaranty Trust Co. of New York*, 111 F. (2d) 115 (C. C. A. 2d, 1940); *U. S. v. American Surety Co. of New York*, 142 F. (2d) 726 (C. C. A. 2d, 1944); *Jenkins Petroleum Process Co. v. Credit Alliance Corp.*, 83 F. (2d) 532 (C. C. A. 10th, 1936); *State of Washington v. U. S.*, 87 F. (2d) 421 (C. C. A. 9th, 1936).

The other cases cited by the defendants in an attempt to support dismissal of intervenors' appeals all involve situations which are not relevant here. They are either cases where there was no final judgment entered by the Court below, or cases where the right to intervene was permissive, and the Court did not abuse its discretion, or cases where the Court held that the intervenor was adequately represented and, therefore, did not satisfy this requirement of Rule 24. For example, *St. Louis Amusement Co., et al. v. U. S.*, 326 U. S. 680, is a previous attempt at appeal in these same proceedings. The St. Louis Amusement Company intervened just after the former consent decree had been reopened. The purpose of the proceeding brought by the Government at that stage was to restore competition in the distribution of films. At the time there was no intimation by anyone that independent theatres would be injured or

bound by the final decree. For that reason representation of independents by the Government was adequate at that time, and the Court so held. The Supreme Court dismissed the appeal on the authority of the *California Canneries* and *Allen* cases, *supra*, since there was not only no final decree at the time, but none was even in prospect.

2. The second contention of defendants is that intervenors have no direct and immediate interest in any *res* which is the subject of the suit.

In a technical sense, there is no *res* in any anti-trust action to break up a combination in restraint of trade. The effect of this argument is, therefore, that no intervention is ever possible in an anti-trust action. Such an argument flies directly in the face of Rule 24 (a) (2). It is also contrary to the only case directly in point prior to the rule, the *St. Louis Terminal* case. In a broader sense, as we pointed out above, the Court has subjected the entire business of intervenors to its order, and has to that extent taken control over the operation of their theatres in a most vital and essential respect.

Moreover, as pointed out above in discussing the *Cameron* case, the requirement of a direct and immediate interest in a *res* which is the subject of the suit is limited to intervention as of right under Rule 24 (a) (3) and need not be demonstrated in perfecting the right to intervene under Rule 24 (a) (2).

3. Defendants urge that the orders denying leave to intervene does not prevent intervenors from instituting independent suits to enforce whatever rights they may possess.

This statement is in contradiction to the facts stated in petitioners' jurisdictional statements. The intent and purpose of the Court's order was to set up a plan of action

common to all distributors to enforce competitive bidding. Clearly, if any intervenor seeks to enjoin that combination or to collect damages from defendants on account of their activities pursuant to the plan authorized by the Court, he will be met with the defense that defendants are required by the Court to carry out this system of uniform action.

For example, suppose that through the enforcement of the uniform competitive bidding system, film rentals are forced so high that many of these intervenors find their profits destroyed. Or suppose that on account of the exercise of the uncontrolled business judgment of the defendants in selecting successful bidders, many of these intervenors find their theatres unable to operate for lack of features. Or suppose through the operation of the system, a theatre is unable to assure itself of a future supply of features, which assurance is necessary for its financial solvency. In these situations, any independent who brought a suit would be barred by the decree from a recovery.

The only answer would be that the Court below exceeded its jurisdiction. But certainly the District Court intends its decree to be a bar to any action by an independent which seeks relief inconsistent with its provisions—and there can be no question of the jurisdiction of that Court.

For example, in *St. Louis Amusement Co., et al. v. Paramount Pictures, Inc., et al.*, 61 F. S. 854 (E. D. Mo. 1945), the District Court in St. Louis upheld the decree of the New York Court with some reluctance, but as a matter of comity. Even though the decree of the District Court could immediately be reversed by another Court, the defendants would have a complete defense for all their interim activities taken on the authority and order of the Court below.

4. In their motions to dismiss defendants argue that intervenors are not inadequately represented within the meaning of the rule because Rule 24 applies only to the class actions, stockholders' derivative suits, etc.

It is sufficient to say that no support for such an argument can be found in the rule or in the cases cited. Furthermore, the Supreme Court of the United States has held directly to the contrary in the *Missouri Kansas Pipe Line* case above cited, where Mr. Justice FRANKFURTER, speaking for the Court, said:

"Where the enforcement of a public law . . . demands distinct safeguarding of private interests . . . the power to enforce rights thus sanctioned is not left to the public authorities, nor put in the keeping of the District Courts' discretion."

5. Finally, defendants argue that intervenors have no claim or defense having questions of law or fact in common with the main action, and that to permit intervention might unduly delay or prejudice the adjudication of the rights of the original parties.

This contention is contrary to the facts of the jurisdictional statements. We need not argue the point, however, because this ground of objection can relate only to permissive intervention. It has nothing to do with the provision of Rule 24 (a) (2), relating to intervention as of right.

6. Defendants argue that if any single defendant, acting by itself, and not in pursuance of a plan adopted by all defendants, sold pictures on competitive bidding, intervenors would have no complaint.

This may be true. But in such a case independents could induce other major distributors to sell on other terms. And if they were free to do so, it is scarcely conceivable that all of them would uniformly refuse, in the absence of collusive action. It is the enforced uniform plan, adopted by all de-

defendants on order of the Court which is the essence of both the wrong and the injury to intervenors. Even if voluntary competitive bidding were invoked by a number of defendants acting individually, necessary alterations and concessions could be made as occasions arose to meet changing economic conditions. The court system imposes a rigid strait-jacket on the industry for the entire future so long as the decree stands.

### **Conclusion**

To deny intervention in the present case is to subject intervenors to irreparable injury resulting from the Court's decree without an opportunity to be heard. The defendants who are objecting to giving intervenors an opportunity to defend their rights in court are the very persons who will benefit by a plan of united action sanctioned by the Court which would be illegal without that sanction. The united front which the decree directs the defendants to take against the intervenors destroys intervenors' power to bargain individually to protect themselves against the enhanced prices which defendants will be able to obtain through competitive bidding after the destruction of existing commercial relationships with independents. No reason, apart from technicalities which we believe we have sufficiently answered, is advanced by the defendants to support the grave injustice of denying a hearing to intervenors. Defendants' statement that intervention will delay or complicate the litigation is obviously specious. Intervenors do not seek to introduce new evidence. They ask no part in the litigation except to protect their rights against the unlawful and harmful provisions of the decree.

It is, therefore, respectfully submitted that this Court have jurisdiction of the intervenors' appeal and of the order denying intervention and that the motions to dismiss the separate appeals of these intervenors should be denied.

April 1, 1947.

Respectfully submitted,

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